

Section-by-Section Analysis of H.R. 3258
The Drinking Water System Security Act of 2009
As Amended by the Subcommittee on Energy and Environment

The Drinking Water System Security Act of 2009 replaces Section 1433 of the Safe Drinking Water Act (SDWA).

Subsection (a). Risk-Based Performance Standards; Vulnerability Assessments; Site Security Plans; Emergency Response Plans

This subsection requires the EPA Administrator to issue regulations establishing risk-based performance standards for covered drinking water systems. The EPA Administrator also must establish deadlines and requirements for developing and updating vulnerability assessments, site security plans, and emergency response plans and providing training to employees of covered water systems.

Covered water systems, by definition, include community water systems serving more than 3,300 people and other public water systems that the EPA Administrator, in her discretion, determines present a security risk.

In developing and implementing the regulations under this section, the EPA Administrator must consult with states exercising primary enforcement responsibility for public water systems (hereafter “states with primacy”) and other persons, including the Secretary of the Department of Homeland Security.

The EPA Administrator may designate any chemical as a “substance of concern” for the purposes of this section. When the Administrator designates a substance of concern, she must establish for each substance a threshold quantity for the release or theft of the substance. In making this designation, the Administrator must take into account Appendix A of the Chemical Facility Anti-Terrorism Standards (CFATS), which lists the Department of Homeland Security’s “chemicals of interest.”

This subsection requires the EPA Administrator to provide covered water systems with baseline information about probable threats to disrupt the safe and reliable supply of water, cause a release of a substance of concern, or steal, misuse, or misappropriate a substance of concern.

Subsection (b). Risk-Based Performance Standards

This subsection requires the EPA Administrator to develop risk-based performance standards for covered water systems to use in developing their site security plans. The standards should be more stringent for systems in higher-risk tiers. In developing these standards, the Administrator must take into account the risk-based performance standards in the CFATS program.

Subsection (c). Vulnerability Assessment

This subsection requires each covered water system to assess the system's vulnerability to a range of intentional acts, including a release of a substance of concern that causes death or injury or other adverse effects. As part of its vulnerability assessment, the covered water system must review its pipes, physical barriers, water distribution facilities, computer systems, storage of substances of concern, and other factors.

Subsection (d). Risk-Based Tiers

The EPA Administrator must establish four risk-based tiers for covered water systems, with tier 1 representing the highest-risk tier.

The EPA Administrator may require each covered water system to submit information in order to assign (or reassign) the system to one of the risk-based tiers. In assigning a covered water system to a tier, the EPA Administrator must consider the potential consequences of an intentional act to cause a release of a substance of concern, to introduce a contaminant into or otherwise disrupt the drinking water supply, and to steal, misuse, or misappropriate substances of concern.

This subsection requires the EPA Administrator to provide to each covered water system her reasons for assigning the system to a particular tier and advise the system whether it is required to assess the potential for implementing methods to reduce the consequences of a chemical release from an intentional act under subsection (g).

Subsection (e). Development and Implementation of Site Security Plans

This subsection allows each covered water system to select layered security measures that address the security risks identified in the vulnerability assessment and meet the applicable risk-based performance standards.

Subsection (f). Role of Employees

In the site security plan and emergency response plan, each covered water system must describe the roles and responsibilities of system employees (including contractor employees) in deterring or responding to an intentional act at that system.

This subsection requires each covered water system to provide at least eight hours of security-related training each year to employees with roles and responsibilities in deterring or responding to an intentional act.

This subsection also requires each covered water system to include employees and appropriate employee representatives when developing, revising, or updating the vulnerability assessment, site security plan, and emergency response plan.

Subsection (g). Methods to Reduce the Consequences of a Chemical Release from an Intentional Act

The term “methods to reduce the consequences of a chemical release from an intentional act” means a measure at a covered water system that reduces or eliminates the potential consequences of a release of a substance of concern due to an intentional act. Such measures include using alternate substances, formulations, or processes to reduce the amount of a substance of concern on-site; modifying pressures, temperatures, or concentrations of a substance of concern; and improving inventory control or chemical use efficiency to reduce on-site handling of a substance of concern.

This subsection requires any covered water system that uses or stores a substance of concern in excess of the release threshold to complete an assessment of whether it can implement “methods to reduce” and include this assessment as part of its site security plan. The covered water system must provide this assessment to EPA and the state with primacy, if any, for that system. In preparing the assessment, the system must describe the methods it considered; the degree to which each method, if implemented, could reduce the consequences of an intentional act; whether each method, if implemented, could affect the quality of drinking water, human health or the environment; whether each method, if implemented, is feasible; the costs (and avoided costs) associated with implementing each method; and, based on these factors, whether the system plans to implement any such methods. A covered water system that does not use or store a release threshold quantity of a substance of concern does not have to complete an assessment.

EPA must provide guidance, computer software and other tools to covered water systems assigned to tiers 3 and 4 in order to streamline the assessment process for these systems.

If the EPA Administrator finds that the covered water system did not submit a complete or thorough assessment, she must inform the system and state with primacy for that system and require the system to submit a revised assessment. If the covered water system fails to complete such assessment in accordance with the deadline set by the Administrator, the Administrator may take appropriate enforcement action.

With respect to a covered water system that has a release threshold quantity of a substance of concern and is assigned to one of the two highest risk-based tiers, the state with primacy for this covered water system must determine, based on an evaluation of the system’s assessment, whether to require such system to implement the methods to reduce and report this determination to the EPA Administrator. For covered water systems in states without primacy (Wyoming and D.C.), the Administrator must make this determination. A covered water system that does not use or store a release threshold quantity of a substance of concern and is not in one of the two highest risk-based tiers will not be subject to any requirement to implement the methods to reduce.

Before requiring a covered water system in one of the highest two risk-based tiers to implement methods to reduce, the state with primacy (or EPA Administrator for covered water systems in states without primacy) must examine whether implementing these methods would significantly reduce the consequences of a release of a substance of concern; would not increase the interim

storage of a substance of concern by the covered water system; would not put the water system out of compliance with SDWA or state and local drinking water standards; and is technologically and financially feasible for the water system.

The state with primacy or EPA (for systems in Wyoming and DC) must provide a covered water system with an opportunity for appeal if the covered water system disagrees with a determination that it implement methods to reduce the consequences of an intentional act.

If a state with primacy fails to determine whether to require a high-risk covered water system to implement one or more methods to reduce within a timeline set by the EPA Administrator, the Administrator can step in and make the determination. If the Administrator finds that a state with primacy has not enforced the state's own determination that a high-risk covered water system implement one or more methods to reduce, the EPA Administrator can step in and enforce the determination. The EPA Administrator may consider the failure of a state to make or enforce a determination when examining whether a state should retain primary enforcement responsibility under SDWA.

Subsection (h). Review by Administrator

This subsection requires the covered water system to submit its vulnerability assessment and site security plan to the EPA Administrator for review. The EPA Administrator must review each vulnerability assessment and site security plan and, in consultation with the states with primacy, as appropriate, determine whether each vulnerability assessment complies with the regulations and whether each site security plan addresses the system's vulnerabilities and meets the risk-based performance standards. EPA also must require each system to correct significant deficiencies, if any, in its vulnerability assessment or site security plan.

This subsection also states that a covered water system does not have to provide state and local governments with copies of its vulnerability assessment and site security plan just by virtue of a state or local law requiring that a system turn over to the state or local government all documents that it provides to EPA.

Subsection (i). Emergency Response Plan

This subsection requires each covered water system to prepare or revise an emergency response plan and certify completion to the EPA Administrator. This plan must include plans and procedures for responding to an intentional act at the covered water system and mitigating the impact of intentional acts on public health and safety. The covered water system must provide appropriate information to local first responders and law enforcement officials to ensure an effective response in the event of an emergency.

Subsection (j). Maintenance of Records

This subsection requires each covered water system to maintain an updated copy of its vulnerability assessment, site security plan, and emergency response plan.

Subsection (k). Audit; Inspection

This subsection requires the EPA Administrator, or a duly designated representative of the Administrator, to audit and inspect covered water systems to determine compliance with this section of the Act. The Administrator or duly designated representative must have access to the system operators, employees and employee representatives during the audit or inspection.

Non-supervisory employees shall have the opportunity to communicate confidential information regarding compliance with the requirements of the section to the EPA Administrator or a duly designated representative of the Administrator. If, during an inspection, representatives of the covered water system are accompanying the EPA Administrator or a duly designated representative of the Administrator, then employee representatives also must be given the opportunity to accompany them.

Subsection (l). Protection of Information

This subsection exempts protected information from disclosure under the Freedom of Information Act and state and local information disclosure laws. This subsection also requires the EPA Administrator to develop standards for sharing protected information with and between state and local governments, first responders, employees, employee representatives, and others with security responsibilities at the covered water system.

Protected information cannot be shared except in accordance with these standards. Any person who purposefully publishes, divulges, discloses, or makes known protected information in any manner or to any extent not authorized by these standards can face criminal penalties.

In judicial or administrative proceedings, protected information will be treated similarly to Sensitive Security Information to protect it from public disclosure.

Nothing in this section relieves a covered water system from complying with other laws, including laws requiring disclosure of information to federal, state or local governments or other persons, except as stated in subsection (h). Nothing in this section authorizes the withholding of information from Congress. Nothing in this section may prevent a federal, state or local government from disclosing information that it obtains from a covered water system as authorized by another law.

“Protected information” includes vulnerability assessments and site security plans and portions of other security-related documents, records, orders, notices, and letters that would be detrimental to the security of one or more covered water systems if disclosed and are developed for the purposes of this section. Protected information does not include information that is required to be made publicly available under any law; information that a covered water system has lawfully disclosed elsewhere; and other information that, if disclosed, would not be detrimental to the security of one or more covered water systems.

Subsection (m). Relation to Chemical Security Requirements

Public water systems are exempt from regulation under the chemical security regulations promulgated by the Department of Homeland Security.

Subsection (n). Preemption

States and political subdivisions thereof can enact security standards for drinking water systems that are more stringent than provided in this section.

Subsection (o). Violations

For a covered water system that violates any requirement of this section, the EPA Administrator can issue an order assessing an administrative penalty or commence a civil action in district court. Civil penalties cannot exceed \$25,000 per day. With regard to “methods to reduce,” EPA’s enforcement authority is limited to the terms detailed in subsection (g).

Subsection (p). Report to Congress

The EPA Administrator must produce a report to Congress no later than three years after the effective date of the regulations promulgated under this section and every three years thereafter. The report will be publicly available.

Subsection (q). Grant Programs

This subsection requires the EPA Administrator to award grants to, or enter into cooperative agreements with, states to assist these states in implementing this section; to award grants to, or enter into cooperative agreements with, non-profit organizations to provide research, training, and technical assistance to covered water systems; and to award grants to, or enter into cooperative agreements with, covered water systems to assist these systems in preparing assessments and plans and implementing methods to reduce the consequences of an intentional act. This subsection also requires the EPA Administrator to establish a grants program to award grants for the training of employees and first responders.

For preparation grants to covered water systems, the Administrator must give priority to systems with the greatest need and systems posing the greatest security risk.

Subsection (r). Authorization of Appropriations

This subsection authorizes \$315 million for FY2011, including \$30 million for administrative costs incurred by the Administrator or states and \$125 million for implementation of methods to reduce. This subsection authorizes such sums as may be necessary for FY2012 through FY2015. Funding for security enhancements shall not be used for expenditures for personnel costs, or monitoring, operation, or maintenance of facilities, equipment, or systems.

The bill also contains provisions that require the EPA Administrator to promulgate regulations within two years after the enactment of this bill. The bill also ensures that the current Section 1433 of SDWA and its accompanying regulations apply until the effective date of the new regulations. Nothing in this section affects the application of Section 1433 of SDWA to any violations of Section 1433 occurring before such effective date.